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August 22, 2012

Via Overnight Mail

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Re: Case 01-RC-080901

Dear Sir/Madam:

Enclosed for filing are eight copies of the Employer's Request for Review of the Regional Director's Decision in the above referenced matter.

Thank you for your attention.

Sincerely,

Katherine D. Clark

Katherine D. Clark

cc: Acting Regional Director, Region One
Burt Rosenthal, Esq.
Ms. Cecelia J. Fraser

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ORDER SECTION

NATIONAL LABOR RELATIONS BOARD

CASE NO. 1-RC-080901

Fraser Engineering Company, Inc.

and

Pipefitters Local 537 Affiliated With the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, AFL-CIO

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

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EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

Pursuant to Rule 102.67, the Employer, Fraser Engineering Company, Inc. ("Fraser Engineering"), hereby requests that the National Labor Relations Board ("the Board") review and reverse the decision of the Regional Director that the appropriate unit for bargaining shall include only employees of Fraser Engineering and not employees of Fraser Engineering's wholly owned subsidiary, Fraser Petroleum Services, Inc. ("Fraser Petroleum"), which were included in a bargaining unit approved by the Board last year.

SUMMARY OF ARGUMENT

Fraser Engineering contends there are compelling reasons for reconsideration of the Board's standard set forth in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011), which was applied by the Regional Director in this case. See 29 CFR 102.67(c)(4)(a request for review may be based on the grounds that "there are compelling reasons for reconsideration of an important Board rule or policy."). In addition, the Regional Director's application of Specialty Healthcare and decision that there was no overwhelming community of interest between Fraser Petroleum employees and Fraser Engineering employees

was clearly erroneous. See 29 CFR 102.67(c)(2) (a request for review may be based on the grounds that "the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.").

STATEMENT OF RECORD FACTS[1]

Fraser Engineering Company, Inc. ("Fraser Engineering") provides mechanical contracting services such as heating and cooling process work, service work, and petro-chemical work. (Tr. 28). Its main office is located in Newton. Sixty percent of the company is owned by the Fraser family that started the business three generations ago. (Tr. 28, 64). Forty percent of Fraser Engineering is held by employees of both Fraser Engineering and Fraser Petroleum as part of an Employee Stock Ownership Program ("ESOP"). (Tr. 64).

Fraser Engineering currently employs thirty-three pipefitters, welders and service/HVAC technicians. (Tr. 71; Er. Exh. 25). Prior to 2010, the Fraser Engineering Mechanical Department performed the installation of new boilers and chillers as well as "process" work that involves building pipe systems for a variety of purposes other than heating and cooling, e.g., natural gas piping, chemical separation systems, and hygienic piping used by the biopharmaceutical industry. (Tr. 43, 50). This included maintenance work on "tank farms" (i.e., gasoline storage tanks in East Boston used to supply gasoline to individual gas stations), (Tr. 43-44), building new pipelines and installing new valves. (Tr. 43). Pipefitters, welders and plumbers performed work in the Mechanical Department. (Tr. 43-44).

Fraser Petroleum Services, Inc., is a wholly-owned subsidiary of Fraser Engineering, created in early 2010 for purposes of branding the work Fraser Engineering was performing in

[1] The Regional Director's statement of the factual background is generally consistent with the record facts set forth herein with the exception of the interpretation of the factual record regarding interchange of employees and the community of interest between Fraser Petroleum and Fraser Engineering employees.

the petroleum industry. (Tr. 64-65). Its creation also allowed the company to report the safety-related incidents of employees of Fraser Petroleum Services separately from Fraser Engineering, which management believed would help market and maintain the petroleum work that was subject to strict safety incident standards required by petroleum customers. (Tr. 455-56).

The thirteen employees of Fraser Petroleum were originally employees of Fraser Engineering. (Tr. 65). Since its creation, the two "new" employees hired by Fraser Petroleum were Fraser Engineering employees who had been laid off from Fraser Engineering. (Tr. 131; 309). Prior to the creation of Fraser Petroleum Services, Inc., the work performed by Fraser Engineering employees in the petroleum area was part of the Mechanical department. (Tr. 388; Er. Exh. 1). Once Fraser Petroleum Services was created, its work continued to be viewed as one operational division or department of Fraser Engineering as were Process and Services/HVAC. (Tr. 389; Er. Exh. 7).

The Fraser Engineering Service Department performs repairs and maintenance for heating boilers and air conditioners. (Tr. 35). Technicians (called either "HVAC Technicians" or "Service Technicians" interchangeably) in the service department typically work independently from each other and often perform several service calls in one day. Technicians also perform work in the Process/Mechanical Department when helping facilitate the start-up of installations of boiler rooms or chillers. (Tr. 41). When working on such start-ups, the technicians work with pipefitters in the Process/Mechanical Department. (Tr. 41).

The management of Fraser Petroleum is the same as the management of Fraser Engineering: Cecilia Fraser is the President and Chief Executive Officer of both companies, Meghan Ellis was the Vice President of Accounting,[2] Elizabeth Stead is the Director of Human

[2] Ms. Ellis resigned to take another position during the pendency of the hearing.

Resources, and Shawna Fraser is the Safety Officer for both companies. (Tr. 65-66). The administrative offices of Fraser Petroleum and Fraser Engineering are located at 65 Court Street in Newton. The companies submit consolidated financial statements and are covered by the same workers' compensation policy. (Tr. 129). Safety policies and employee policies are the same for all Engineering and Petroleum employees. (Tr. 132). Fraser Petroleum employs sixteen people, all of whom are pipefitters, welders, and managers/supervisors; it does not employ any clerical, finance/accounting or human resources employees. (Tr. 247-48; Er. Exh. 16).

Departments within Fraser Engineering – Service and Process – are headed by a managers/supervisors: employees in the Process department report to Project Manager/Estimator Oliver Broschk and Estimator Ed Nickerson; service technicians in the Service department report to Service Manager Jim Carey and Estimators Ken Lysik and Sean Merchant; pipefitters and welders and plumbers in Service report to Estimators Robert Flaherty and Mike Gorman; and pipefitters and welders in Fraser Petroleum report to COO/Group Leader/Estimator/Project Manager Phil DiSciullo, Supervisor Eric Davis, and Assistant Manager Joe Hamilton.

When Fraser Petroleum was created and became operational in 2010, nothing changed in terms of the work the employees were actually doing on petroleum matters. (Tr. 67; 715). Upon Fraser Petroleum's creation, employee wages, benefits (including the employee stock ownership plan), supervision, and seniority all remained unchanged. (Tr. 68; 528; Er. Exhs. 24A-24C). In other words, the change was in the corporate structure only, not in the way work was performed, employee duties, or policies. (Tr. 67-68).

When Fraser Engineering recently held a company-wide meeting about the future of the company, employees of both Fraser Engineering and Fraser Petroleum attended the meeting.

(Tr. 72; 670). Similarly, because Engineering and Petroleum employees have the same benefits, they are all invited to attend the same benefits fair. (Tr. 80; Er. Exh. 8). Fraser Engineering pays the health insurance bill for both Engineering and Petroleum. (Tr. 81). Safety meetings, held at 65 Court Street, also include employees of both Engineering and Petroleum. (Tr. 82; 722-23). When there are meetings to discuss projects and updates, managers from Engineering and Petroleum provide the information to the employees attending. (Tr. 155; Er. Exh. 6).

Pipefitters and welders for both Fraser Engineering and Fraser Petroleum complete the same type of time cards to record their work hours.[3] (Tr. 73). When employees record their work hours, they also write the job number on which they performed work, which number indicates whether it is a Fraser Engineering job or a Fraser Petroleum job. (Tr. 74). Fraser Petroleum and Fraser Engineering maintain separate payroll systems and employees receive a paycheck from their respective employer even if they perform work for both Fraser Engineering and Fraser Petroleum in the same workweek. (Tr. 67).

Fraser Petroleum is considered a division or department of Fraser Engineering because it operates in the same way that the Process and Service divisions do. (Tr. 63). Work assignments between Service, Process and Petroleum matters are made by managers at weekly meetings attended by project managers and group leaders for each division (including Petroleum). (Tr. 64). Project managers determine their manpower needs on jobs looking forward for two weeks, and employees from Fraser Engineering and Fraser Petroleum are assigned accordingly, with Engineering employees working on Petroleum jobs and Petroleum employees working on Engineering jobs as needed. (Tr. 123-24; 246; 546-47). Generally, for purposes of maintaining

[3] Service technicians (employed by Fraser Engineering) enter their time through iPads in a software system that is separate from other employees because of the unique work they perform in the field on a daily basis. (Tr. 75; 141)

continuity on jobs, employees tend to be assigned to the same jobs for as long as possible with other employees supplementing these workers as needed. (Tr. 127-28). This is same system that was in place prior to the creation of Fraser Petroleum in 2010. (Tr. 246).

The job duties of pipefitters and welders are the same whether they work for Fraser Engineering or Fraser Petroleum. (Tr. 104-05; Tr. 293-94). Most importantly, pipefitters and welders employed by Fraser Engineering and Fraser Petroleum perform work on jobs that are designated "Engineering" or "Petroleum." For example, of the 39,666 hours worked on Petroleum jobs in which there was interchange of employees, 2,330 hours were worked by Engineering employees. (Tr. 90; Er. Exh. 9B). Conversely, of the 35,672.50 hours on Engineering jobs in which there was an interchange of employees, 2,749.5 hours were worked by Petroleum employees. (Er. Exh. 10B). Of the 125 jobs Fraser Petroleum has had since its creation, Fraser Engineering employees have worked on 42 of them, while only 83 Petroleum jobs were performed entirely by Petroleum employees. (Er. Exh. 14B). Petroleum employees were assigned to work on 21 of the 393 Fraser Engineering jobs from March 2010 to May 2012 (this total job number includes all the HVAC service work which typically involves a single service technician performing work on a job). This same interchange existed before the creation of Fraser Petroleum in 2010.

The only difference in the type of work performed by welders and pipefitters is the type of systems they are installing. (Tr. 106, 121). However, there are no systems or types of pipes installed by Fraser Engineering that are not also installed by Fraser Petroleum. (Tr. 106). When a Fraser Engineering employee performs work on a Fraser Petroleum job, the employee is supervised by a Fraser Petroleum project manager, and vice versa. (Tr. 547-54). Examples of

Petroleum employee timesheets that reflect work Petroleum employees performed on Engineering jobs are included in Employer Exhibits 18-23. (Tr. 279-88).

An example of a job in which both Engineering and Petroleum employees worked together is the current "Massport" job, a pipeline that runs from Sunoco to Logan Airport, which involved replacing thousands of feet of pipe and welding work inside of the dyke wall. (Tr. 266). Pipefitters and welders from Engineering and Petroleum worked together fitting and welding pipe on the same pipeline. (Tr. 295). Pipefitters and welders never work alone due to safety concerns; they are always scheduled in pairs.[4] (Tr. 295; 554). At times Engineering pipefitters and welders work side by side with Petroleum pipefitters and welders on a day-to-day basis depending on the job in question. (Tr. 418-20; 551; 553-58).

All welders for Engineering and Petroleum are certified by Fraser Engineering's Project Manager Oliver Broschk. (Tr. 542). Similarly, Broschk certifies that employees in both Fraser Petroleum and Fraser Engineering are qualified to perform specific kinds of "code repairs" on certain vessels. (Tr. 544). He also certifies that certain projects completed by both Fraser Engineering and Fraser Petroleum meet specific code or installation requirements. (Tr. 545).

When work needs to be done in the shop rather than the field, both Engineering and Petroleum employees perform such shop work at the same location at 65 Court Street in Newton. (Tr. 273; Er. Exh. 17B). Pipefitters and welders for both Engineering and Petroleum also use tools and consumables provided by the same shop at 65 Court Street in Newton. (Tr. 164-65; 304). Materials purchased for Petroleum jobs are ordered by Fraser Engineering unless specifically ordered in person by a Petroleum employee. (Tr. 165). Fraser Engineering and Fraser Petroleum also share the same crane (marked by the Fraser Engineering logo) if needed

[4] This is not true for service technicians employed by Fraser Engineering, who generally perform service calls on their own. (Tr. 297; 701). Service technicians may work with other employees when working on a start-up or installation. (Tr. 297).

on a particular job. (Tr. 167). Long-term projects performed by Fraser Engineering and Fraser Petroleum typically have a trailer on the job site that can be used to store tools and materials and provide a space to review project drawings. (Tr. 370-73; 656-57).

All hiring and termination decisions for employees of Engineering and Petroleum are made by President and Chief Executive Officer Cecelia Fraser in collaboration with the department manager and Human Resources Director Liz Stead. (Tr. 132-33). Performance reviews for employees of both Fraser Engineering and Fraser Petroleum are completed with participation of President and Chief Executive Officer CJ Fraser and Director of Human Resources Liz Stead. (Tr. 723). New hires for Engineering and Petroleum are subject to the same orientation procedure (Tr. 135; Er. Exh. 11) and benefits enrollment process. (Tr. 137; Er. Exh. 11). All employees have access to the intranet called "HR Connection," which serves employees of both Engineering and Petroleum, (Tr. 137-38), and they receive the same Employee Handbook that applies to all employees. (Tr. 153, Er. Exh. 12). The same "core values" apply to both Engineering and Petroleum. (Tr. 140). Pipefitters and welders working for Engineering and Petroleum receive the same company-provided work clothing (e.g., t-shirts, sweatshirts), with the only difference being in the logo on the clothing. (Tr. 149) Fraser Petroleum employees who are given a company vehicle drive trucks with the Fraser Engineering logo. (Tr. 150).

In December 2010, Fraser Engineering received a representation petition that included the pipefitters and welders of Fraser Petroleum as well as Fraser Engineering. (Tr. 163; Er. Exh. 13A). The employees rejected the union's representation. (Tr. 163; Er. Exh. 13B). Since the filing of the 2010 petition, there has been no change to the work being performed by pipefitters and welders employed by Fraser Engineering and Fraser Petroleum. (Tr. 756).

At the hearing in this matter, Fraser Engineering subpoenaed Leo Fahey, the business manager/secretary/treasurer of the union. (Tr. 755). The union did not file a petition to revoke the subpoena, yet Mr. Fahey never appeared to testify as required by the subpoena. Accordingly, Fraser Engineering made an offer of proof that was unrebutted: The union's jurisdiction covers pipefitters and welders that work on a variety of pipes that carry a variety of substances, including petroleum. (Tr. 755). The work performed by pipefitters and welders employed by Fraser Petroleum is, therefore, work within the union's jurisdiction. (Tr. 755). If the union became the representative of Fraser Engineering pipefitters and welders, the union would expect that all the pipefitting and welding work performed by Fraser Engineering would be performed by union members, not non-union pipefitters and welders employed by Fraser Petroleum. (Tr. 756). The union would not allow Fraser Engineering employees to work alongside non-union Fraser Petroleum employees doing the same work and vice-versa. (Tr. 756-57). If an election were held among the Fraser Engineering employees, then the union would likely seek by way of accretion the inclusion of Fraser Petroleum pipefitters and welders into the Fraser Engineering bargaining unit without giving them the opportunity to vote on a question concerning representation. (Tr. 757).[5]

ARGUMENT

1. There are compelling reasons for reconsideration of the Board's new standard set forth in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011), which was applied by the Regional Director in this case.

A. The Board abused its discretion by creating an entirely new rule without justification or explanation.

Although the National Labor Relations Act ("NLRA" or "the Act") gives the Board discretion in determining an appropriate unit for collective bargaining, this discretion is

[5] Additional facts will be discussed infra.

proscribed by the terms of the Act, prior Board precedent, and court decisions. Section 9(a) provides that representatives "in a unit appropriate for" collective bargaining "shall be the exclusive representatives of all the employees in such unit," and section 9(b) requires that the Board "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Accordingly, the Act requires that the Board determine the appropriate group of employees for the bargaining unit. The Board fails to perform this "statutory duty when it does not exercise its discretion under that section." NLRB v. Indianapolis Mack Sales & Service, 802 F.2d 280, 283 (7th Cir. 1986).

The impact of the Board's representation decision is significant; if the Board certifies an inappropriate unit, it creates "a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b)." NLRB v. Pinkerton's, Inc., 428 F.2d 479, 482 (6th Cir. 1970) (quoting Kalamazoo Paper Box Corp., 136 NLRB 134, 139 (1962)). Although the Board must only define an appropriate unit and not the most appropriate unit, the Board's definition must effectuate the policy of efficient collective bargaining, Pittsburgh Plate Glass Co v. NLRB, 313 US 146, 165 (1941). "An employer is entitled to a reasonably adequate protection from the results of piecemeal unionization." Pinkerton's, 428 F.2d at 485.

Once the Board adopts an interpretation of the Act, the interpretation "embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that these policies will be

carried out best if the settled rule is adhered to." Atchison, T. & S.F. Ry. Co. v. Witchita Bd. Of Trade, 412 U.S. 800, 807-08 (1973). If the Board adopts a different interpretation of the Act, it must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). "When the Board departs from its usual policies, it is essential that the reasons for the decisions in and distinctions among these cases be set forth to dispel an appearance of arbitrariness." Bay Med. Ctr., Inc. v. NLRB, 588 F.2d 1174, 1177 (6th Cir. 1978) (internal quotations omitted).

The Board's decision in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011) held that any identifiable group of employees sought by the union, who share a community of interest, is an appropriate unit unless there is the rare situation in which excluded employees share an overwhelming community of interest with the included employees. The result of this standard is to give controlling weight to the unit sought by the union. In no case is this more evident than the instant matter.

Although the Board contended that Specialty Healthcare was simply a "clarification" of the law regarding the determination of an appropriate unit, in reality it is a dramatically different standard adopted without justification for a new rule or explanation about how it should be applied. Since the Board's ruling in Specialty Healtchare, the new rule has been applied in a variety of different settings and contexts. See, e.g., Odwalla, Inc., 357 NLRB No. 132 (2011) (beverage industry); Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011) (shipbuilding technical employees); DTG Operations, Inc., 357 NLRB No. 175 (2011) (car rental agents).

The dissent in Specialty Healthcare noted the fact that the Board majority had created a new rule of general applicability, which is a clear abuse of discretion: "Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." Specialty Healthcare, slip op. at 15, App. 69 (Member Hayes, dissenting).

There was nothing about the facts of the Specialty Healthcare case or the Regional Director's decision that warranted a complete alteration of the traditional community of interest standard that has been in place for decades. Under these circumstances, in which the Board failed to articulate the reasoning of its new standard, the Board abused its discretion. As noted by the dissent,

> This is perhaps the most glaring example in cases decided recently of my colleagues initiating a purported empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any actual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce.

Specialty Healthcare, slip op. at 16, App. 70 (footnote omitted).

B. The overwhelming-community-of-interest standard violates Section 9(c)(5) by giving controlling weight to the union's extent of organization.

The result of the new Specialty Healthcare standard is to give controlling weight to the extent of organization as prohibited by Section 9(c)(5). In NLRB v. Lundy Packing Co., 68 F.3d 1577, 1581 (4th Cir. 1995), the Court concluded that the Board had violated Section 9(c)(5) by applying an "overwhelming" community of interests standard and disregarding prior decisions to exclude quality control employees from a unit of production and maintenance employees. The court reasoned that "[b]y presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization." Lundy Packing, 68 F.3d at 1581.

The new method announced in Specialty Healthcare violates Section 9(c)(5) because it focuses the unit determination on an isolated inquiry that does not consider the shared interests between the proposed unit and other employees. Rather, the new standard requires a two-step review of the unit proposed by the union, the first step being an isolated inquiry as to whether the employees in the proposed unit share a community of interest with each other. If this step is answered affirmatively, then the unit is presumptively appropriate, without regard to whether the employees of the proposed unit share a community of interest with other employees. Specialty Healthcare, slip op. at 9-11. Once the unit is presumptively appropriate, the party seeking a larger unit must prove there is "overwhelming" community of interest with other employees.

This standard is contrary to the court's decision in Lundy, in which the Court of Appeals rejected the overwhelming-community-of-interest standard as a violation of Section 9(c)(5). It gives excessive weight to the union's organizing efforts and allows them to be controlling in many instances, because proving an "overwhelming" community of interest is such a significant burden. Other than cases in which the union proposes a unit of multiple classifications yet arbitrarily excludes other classifications with an identical community of interest, the union's proposed unit will always be approved by the Board. See, e.g., DTG Operations, Inc., 357 NLRB No. 175 (2011); Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011); Dyno Nobel, Inc., 19-RC-075260, review denied, 2012 WL 1410021 (April 23, 2012); Extendicare Homes, Inc., 18-RC-070382 (December 30, 2011), review denied, 2012 WL 252255 (NLRB) (Jan. 24, 2012); Prevost Car U.S. d/b/a Nova Bus, 3-RC-71843 (Feb. 17, 2012), review denied, 2012 WL 870846 (NLRB) (March 14, 2012); This violates Section 9(c)(5) by giving the union's extent of organization controlling weight in the unit determination.

The controlling weight accorded to the union's extent of organization is particularly evident in the instant case, in which the Regional Director just last year approved a bargaining unit consisting of pipefitters, welders, plumbers and technicians of both Fraser Engineering and Fraser Petroleum. There has been no change in circumstances since that time. However, following the union's loss in the 2011 election, the union now petitions in 2012 seeking to represent only the Fraser Engineering employees. The Regional Director's approval of this unit –without regard to the fact that this group does not share a community of interest distinct from the Fraser Petroleum employees – gives the union's extent of organization the controlling weight in the determination of the bargaining unit. The Regional Director's contention that the Board has not given such controlling weight to the union's organizing effort rings hollow when the result of the representation determination is predetermined by the new overwhelming community of interest standard applied by the Regional Director in this case.

The overwhelming-community-of-interest standard also fails to give weight to the legitimate interests of employees excluded from the unit. The traditional community-of-interest standard protects employees outside the bargaining unit by making sure that the unit contains a group of employees with common interests that are distinctively different from other employees. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 64 (1975). A bargaining unit that is too narrow, such that it excludes employees who are in the same trade/craft classifications and who have a close community of interest with the employees in the unit, will effectively deny the excluded employees a meaningful opportunity to be represented or to engage in collective bargaining. For example, the unit found appropriate here includes approximately 33 pipefitters, welders, plumbers and technicians employed by Fraser Engineering and excludes approximately 13 pipefitters, welders and plumbers employed by Fraser Petroleum.

Assuming the excluded employees could organize as a separate unit, their strength would be significantly diminished as compared to a bargaining unit consisting of all employees in the same classifications. The Regional Director's decision would result in fractured units despite the fact the pipefitters, welders, plumbers and technicians perform the same work and share common interests.

2. The Regional Director's application of Specialty Healthcare and finding that pipefitters and welders of Fraser Petroleum do not share an overwhelming community of interest with the same classification of workers employed by Fraser Engineering is clearly erroneous and prejudicially affects the Employer.

Even if the new Specialty Healthcare standard were legitimate, the Regional Director's decision in this case is nonetheless clearly erroneous because pipefitters and welders of Fraser Petroleum share an overwhelming community of interest with pipefitters and welders of Fraser Engineering. It is indisputable that Fraser Engineering owns Fraser Petroleum and the management of both companies is centralized: they share the same President and Chief Executive Officer, the same Vice President of Accounting, the same Human Resources Director, and the same Safety Officer. Ms. Fraser and Ms. Stead participate in all hiring decisions and terminations of employees of both Fraser Engineering and Fraser Petroleum. The share the same administrative offices at 65 Court Street, and this facility serves as the workshop for all employees of both companies.

All employees of both Fraser Engineering and Fraser Petroleum are subject to the same benefits and participate in the same Employee Stock Ownership Plan. They attend the same company-wide meetings at which the future of the companies' work is discussed, they are subject to the same safety standards and safety-related training, and they obtain their tools from the same place. The lack of distinction between the employees of the two companies is

evidenced by the fact that Fraser Petroleum did not exist until 2010, and upon its creation in 2010 there was no change to the wages, hours and working conditions of the employees performing the work for both companies; it was a change only to the corporate structure. Indeed, all of the employees of Fraser Petroleum were previously employees of Fraser Engineering. As the Regional Director found:

> Fraser Petroleum employees do share some common interests with the Fraser Engineering employees....Fraser Petroleum employees perform essentially the same work as the Fraser Engineering pipefitters, welders and plumbers and thus share common duties, skills and qualifications with the petitioned-for employees. Their pay is similar, their benefits are identical, and they are subject to the same company rules and policies.

Decision at p. 14.

Most importantly, the operations of both Fraser Engineering and Fraser Petroleum are functionally integrated. As they did before the creation of Fraser Petroleum, project managers from Engineering and Petroleum meet together weekly to determine appropriate scheduling and manpower distribution to accomplish their work. When a project manager identifies the need for additional manpower on a project, that manpower can come from either Petroleum or Engineering employees regardless of whether the project is one originating on the Petroleum or Engineering side of the business. This means that an Engineering pipefitter or welder will perform work on a Petroleum job and vice versa. Oliver Broschk, Project Manager for Fraser Petroleum, testified that on all jobs identified as jobs worked by both Fraser Petroleum and Fraser Engineering employees, the employees from the two groups worked together. These employees also work together at the shop in Newton.

The fact that most employees tend to work continuously on ongoing projects (rather than rotating constantly between different jobs) does not negate the fact that Engineering employees and Petroleum employees are often working on the same job, performing the same work.

Indeed, of the 125 Fraser Petroleum jobs performed since 2010, Fraser Engineering employees have worked on one third of these projects along with Fraser Petroleum employees in the same classification. Similarly, that some Fraser Engineering pipefitters, welders, or service technicians may typically work with the same coworkers consistently, with little interaction with employees of Fraser Petroleum, does not alter the fact that Engineering employees perform work on Petroleum jobs where Petroleum employees perform the same pipefitting and welding work. Indeed, the union's own witnesses, both employed by Fraser Engineering, testified that they routinely worked with the same individuals and did not know many of the other employees working for Fraser Engineering. (Tr. 646-51; 716-17; 721). In other words, the nature of Fraser Engineering's work is such that many Fraser Engineering employees do not work with each other any more than they work with employees of Fraser Petroluem.

Employees of Fraser Petroleum are subject to the supervision of Fraser Engineering project managers on Engineering projects while Fraser Engineering employees are similarly subject to the supervision of Fraser Petroleum project managers on Petroleum jobs. There is no difference between the type of work that pipefitters and welders perform, whether they are working on a Petroleum or an Engineering job.

The fact that pipefitters and welders for Petroleum and Engineering perform the same tasks, work with each other on projects for both companies, are subject to the same employment policies and centralized management, are functionally integrated with each other and are subject to the same supervision on a project-by-project basis, means that the proposed unit of Fraser Engineering pipefitters, welders, and service technicians have an overwhelming community of interest shared with the pipefitters and welders of Fraser Petroleum. Allowing the proposed unit to consist of only Engineering employees fractures the group of employees performing the same

trade and job functions interchangeably. Indeed, dividing a craft is particularly inappropriate in light of the unity of craftspeople recognized by the Board in the construction industry. See, e.g., R.B. Butler, Inc., 160 NLRB 1595 (1966); Dick Kelchner Excavating Co., 236 NLRB 1414 (1978).

The Regional Director's reliance on Grace Industries, LLC, 358 NLRB No. 62 (2012) is misplaced, when the Board in that case considered the interchange between employees of different classifications who sometimes performed work similar to that of the classifications in the proposed unit. In this case, however, it is undisputed that pipefitters and welders of Fraser Petroleum perform the same work as pipefitters and welders for Fraser Engineering. Contrary to the different classifications at issue in Grace Industries, pipefitters and welders between Fraser Petroleum and Fraser Engineering have the same skills, functions, and interests in wages and working conditions –more than even a "significant overlap." The Regional Director's determination that these factors and the documented interchange on one third of Petroleum projects does not amount to an overwhelming community of interest is clearly erroneous.

The prejudice to the Employer resulting from this clearly erroneous decision is obvious. Under the current definition of the bargaining unit, a Fraser Petroleum Project Manager will be supervising pipefitters and welders of both Petroleum and Engineering on a single project, yet one pipefitter or welder will be covered by a collective bargaining agreement and the other will not (or will be covered by a different collective bargaining agreement). This is an impracticable and untenable scenario.

This result subjects Fraser Engineering to a claim that it is operating as a double breasted organization. It is indisputable that Fraser Engineering and Fraser Petroleum have the same ownership, management, business purpose, operation, equipment, customers and supervision.

See Advance Electric, 268 NLRB 1001, 1004 (1984) (setting forth the standard for determining whether an organization is double breasted). If Fraser Engineering employees become part of the union, then Fraser Engineering can no longer use Petroleum employees to perform bargaining unit work for Fraser Engineering, which has been the practice of Fraser Engineering since before and after the creation of Fraser Petroleum in 2010. (Tr. 756).

If the union becomes the representative of Fraser Engineering pipefitters and welders, it would not allow Fraser Engineering employees to work alongside Fraser Petroleum non-union pipefitters and welders. (Tr. 756). Because of the functional integration of operations between Fraser Engineering and Fraser Petroleum and the similarity of the work performed by pipefitters and welders employed by both companies, an election among only Fraser Engineering employees will likely result in the union's future assertion that pipefitters and welders of Fraser Petroleum must be accreted into the union. This accretion would occur without giving these employees an opportunity to vote about the union's representation. (Tr. 757). See, e.g., NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc., 191 F.3d 316 (2nd Cir. 1999) (affirming Board's decision that employees at a spinoff bottling facility should be accreted into nearby bottling facility even though interchange was limited to one employee at spinoff facility who punched a time clock at the other facility before performing most of his duties at spinoff facility). This would deny the Fraser Petroleum employees the right to participate in the representation decision.

CONCLUSION

For the foregoing reasons, the Board should review the Regional Director's decision and conclude that the only appropriate unit must include pipefitters, welders, HVAC technicians and apprentices for each craft employed by both Fraser Engineering and Fraser Petroleum.

Respectfully submitted,

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Certificate of Service

This certifies that I have served a copy of the herein document on counsel for Pipefitters Local 537 and the Regional Director by first class mail on August 22, 2012.

Katherine D. Clark

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